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DEC 19 1958

Case No. 8860

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED
DEC 26 1958

Clerk, Supreme Court, Utah

MOLEN REES,

Plaintiff and Appellant,

vs.

EDWARD B. SCOTT,

Defendant and Respondent.

BRIEF OF RESPONDENT

STEPHENS, BRAYTON & LOWE,
and THOMAS C. CUTHBERT.

Attorneys for Respondent

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BRIEF OF RESPONDENT

STEPHENS, BRAYTON & LOWE, and THOMAS C. CUTHBERT, appearing specially for the sole purpose of resisting this appeal from the Trial Court's order quashing service of summons upon Dr. Edward B. Scott, file the following brief of respondent.

STATEMENT OF FACTS

Appellant attempted to commence an action for alienation of affections against respondent, a resident of California, by service of summons. The summons was served by a Deputy Sheriff of Salt Lake County upon Dr. Scott personally, but at the time of service, the deputy sheriff did not endorse upon the copy left with Dr. Scott the date upon which the same was served, nor did he sign his name thereto, nor did he add his official title thereto (Record p. 5).

On February 19, 1958, respondent, appearing spe-

cially through his attorneys, filed a motion to quash the service of summons. This motion was heard on February 26, 1958, and said motion was granted.

Respondent takes issue with the statement of facts contained in Appellant's Brief in the following respects:

(1) Statement on page 5 that on the 19th day of February, 1958, attorney for Respondent receipted for a copy of the complaint. There is nothing in the record before this Court to support this statement, nor was the point raised in any way before the trial court.

(2) Statement on page 4 as to reason for Dr. Scott leaving the State of Utah. These matters are based upon the affidavit of Dr. Molen Rees, Appellant, in support of a motion to amend process, and were not before the Court on the motion to quash summons. The statements contained in said affidavit are incompetent in stating a condition of mind of the Respondent and are hearsay as to statements concerning any return of Respondent to this state. Respondent points out that under a special appearance it was not possible to resist this motion and therefore no contrary evidence on these points could be offered, and further that any attempts to avoid process, except refusing service of summons, are wholly immaterial to a question of whether a defendant is properly served with process.

STATEMENT OF POINT RELIED ON

POINT I.

THE FAILURE TO ENDORSE THE DATE AND PLACE
OF SERVICE ON COPY OF SUMMONS LEFT WITH DE-

FENDANT WAS A FATAL DEFECT, AND WHERE TIMELY ATTACKED BY MOTION, THE SERVICE MUST BE QUASHED IRRESPECTIVE OF WHETHER THE DEFENDANT WAS MISLED.

Rule 4(j) of the Utah Rules of Civil Procedure provides:

“At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his name thereto, and, if an officer, add his official title.”

This rule is the same in substance as the provisions of Sec. 104-5-7, Utah Code Annotated, 1943. This Court in the case of *Thomas vs. District Court*, 171 Pac. 2d 667 (1946) specifically considered this provision in a fact situation substantially identical to that in the case at bar. In that case the plaintiff commenced an action in Salt Lake County by filing a complaint, and a police officer of the Salt Lake City Police Department served the summons on Defendant personally but did not endorse upon the copy of the summons left with Defendant the date of service, nor did the officer sign his name or official title thereon. Defendant, appearing specially, filed a motion to quash the service of summons. The District Court denied the motion. Defendant then brought the action before the Supreme Court by certiorari against the District Court and Hon. J. Allan Crockett, District Judge.

The defense was raised that the Defendant had not been misled and therefore a motion to quash should not be granted. The Court says at pages 670-1:

“The date endorsed indicates the time within which defendant must appear. If the date is not endorsed the defendant would have no definite date fixed by the summons to appear. The statute directs that the server, at the time of service, *must* endorse on the copy the date of service, and leave it with defendant. This enables the person served to check against the server the date, so the return will [not] indicate a date different from the real date served. If summons is served in advance of filing complaint, and complaint is not filed within ten days after service, the service of summons and filing of complaint are both void and the court should dismiss the action and require the plaintiff to begin all over again. Section 104-5-9, U.C.A. 1943; Reese vs. Judges, 52 Utah 520, 175 P. 601; James vs. Jensen, 50 Utah 485, 167 P. 827. If date is not endorsed on copy defendant could not avail himself of this right on the record. And where a summons is served not on defendant personally but by leaving it at his usual place of abode, during his absence perhaps for a few days, he would not know on his return when he must appear or be in default. These matters are not disputed by ‘The Court,’ but it argues that Plaintiff here must allege and show he was misled by the defect. Such is not the provision of the statute. And we find no well reasoned, adjudicated case, holding that where service is attacked by motion before pleading or judgment, the trial court can inquire into the question of being misled. * * *

“Without prolonging the discussion, we conclude that the failure to endorse the date and place of service on the copy of the summons as required by Sec. 104-5-7 quoted supra is a fatal defect when timely attacked by motion, and such service of summons should be quashed.”

In Appellant's Brief, the concurring opinion of the Thomas case is urged for the proposition that failure to endorse time of service is not jurisdictional. Whether or not failure to endorse time of service is jurisdictional is not a controlling factor in the case at bar but rather, whether the lower court properly sustained a motion to quash which was timely made. Careful analysis of the concurring opinion demonstrates that Justices Wolfe and McDonough were concerned first as to whether or not certiorari was the proper remedy to be invoked in that case, or whether it should have been prohibition; and secondly, whether the failure to endorse made a judgment based on such service void and subject to collateral attack or only voidable, which would be subject only to a direct attack and would be waived if not raised by timely motion. The concurring opinion holds that a court has jurisdiction to determine the question of its own jurisdiction and when it is in the process of determining its jurisdiction it is not exceeding its jurisdiction and therefore certiorari would not lie, the proper writ being prohibition. On the second question the concurring opinion states, at pages 673-4:

"I am of the opinion that the irregularity in the case at bar is such that the service was voidable. By that I mean the defendant by timely and proper attack may have the service set aside. Before judgment (absent a general appearance) the proper attack was motion to quash the service. Had a default judgment been entered — appeal or motion to set aside the judgment as provided for by Section 104-4-4, U.C.A. 1943, or suit in equity to set aside the judgment would have been

possible attacks. However, the service though defective gave the court jurisdiction of the defendant and had a judgment been entered pursuant thereto it could not have been successfully attacked collaterally on grounds of no jurisdiction of the defendant."

The foregoing quotation demonstrates that by following the reasoning of either the majority opinion or concurring opinion the ruling of the trial court was correct in quashing summons in the case at bar.

That the result achieved in the *Thomas* case is proper in the light of the history of this provision is demonstrated by an examination of the enactment of this provision in 1898. An almost identical provision is to be found in our civil procedure since its enactment as Section 2944 Revised Laws of Utah, 1898. Prior to this time an action could be commenced only by the filing of a complaint (See Section 3202, Compiled Laws of Utah 1888). Section 2944 was added to the code at the time our procedure was changed to permit the commencement of an action by service of summons, and was taken from Section 2635a, Annotated Statutes of Wisconsin, 1889. The Wisconsin provision is substantially identical with Sec. 2944, Revised Laws of Utah 1898, with one very notable exception. Section 2635a provided as follows:

"Any sheriff or other person, authorized to serve a summons and who shall serve a summons which shall be the commencement of an action in any court in this state, shall, at the time of service thereof, indorse upon the copy or copies of such summons which he shall deliver to the

defendant or defendants in such action, the date upon which the same was so served, and sign his name thereto, and if an officer, his official title; provided that nothing herein contained shall be construed to invalidate a service not made in conformity with the requirements of this act and provided further that the officers making such service and failing to make the indorsement thereon provided for, shall not tax any fees therefor."

When the Utah provision was enacted, the proviso of the Wisconsin act that the failure to indorse did not invalidate the service was omitted. This is a strong indication that it was intended by the Utah law that the failure to make the indorsement would invalidate the service of summons.

The Utah Supreme Court in the case of *Winters v. Hughes*, 3 Utah 443, 24 P. 759, under somewhat similar provisions of Utah procedural laws said in the syllabus:

"A summons which fails to state the time and place at which a defendant is required to appear and answer the complaint filed against him is defective, and will be quashed upon motion interposed before appearance and plea."

In seeking decisions from other jurisdictions on this point, counsel has found only one other state with a similar indorsement provision, namely, Georgia. In 1946, the Georgia Supreme Court and Georgia Legislature adopted an indorsement provision substantially the same as the Utah provision. Rule 6 of Rules of Procedure, Pleading and Practice in Civil Actions, Georgia Court Rules, effective January 1, 1947, page 34; Georgia Laws 1946, p. 761 at p. 769.

Three cases were decided by the Georgia Courts under this provision holding failure to indorse the copy served was jurisdictional. In the case of *Payne v. Moore Finance Company*, 87 Ga. App. 627, 74 S.E. 2d 746 (1953) the court said:

“The only question in this case is whether a judgment against a defendant is void where he was personally served with a copy of petition and process, and the serving officer failed to show the date of service on such copy and sign it, and where the defendant did nothing to waive the omission. We think that the requirement of the Resolution passed by the General Assembly, Ga. L. 1946, pp 761, 769, Code Annotated, Supp. Sec. 81-202 providing that each copy served on a defendant shall show a date of service signed by the officer serving is mandatory and jurisdictional in the absence of waiver of jurisdiction of the person.”

See also *Jennings v. Davis*, 92 Ga. App. 265, 88 S.E. 2d 544 (1955); *Jones v. Roberts Marble Company*, 90 Ga. App. 830, 84 S.E. 2d 469 (1954).

Appellant's brief argues that the failure to endorse should be construed as harmless error under the provisions of Rule 61, U.R.C.P. This was the precise ground upon which the defense was made in the *Thomas* case, supra. It is noteworthy that at the time of the decision of the *Thomas* case, sections 104-14-7 and 104-39-3, U.C.A. 1943 were in effect and are substantially the same in effect as Rule 61. In the *Thomas* case, this Court ruled that the motion to quash should be granted irrespective of whether or not the defendant had been misled.

A person who faces a substantial judgment by default if his answer is not timely filed has the right to know without any question the time within which he must act. Under our procedure, the only proof he has of this time is the endorsement of the date, signed by the person serving the summons. This must be done at the time of service and therefore is not subject to any weaknesses of recollection of the person serving such as a return of service might be when as much as five days after the act. The copy of the summons left with a defendant is the only record which he has in his possession, and the most vital piece of information on the summons, namely when the defendant must act, is imparted only if it is properly endorsed as required by Rule 4 (j).

Appellant's Brief suggests on appeal for the first time that counsel for Respondent obtained a copy of the complaint from the clerk's office and that this makes the failure to endorse harmless error. No evidence on this point was presented at the hearing of the motion to quash, no mention of the point was made to the trial court or anywhere until it is mentioned in Appellant's Brief, and there is nothing in the record to support this statement. For this reason this court cannot consider the matter on this appeal. It is respondent's contention however that this point is immaterial in the case at bar even if it were properly before the court. In the Thomas case, *supra*, the action was commenced by filing of the complaint and a copy of the complaint was served with the summons. Even conceding the correctness of Appel-

lant's statement that a copy of the complaint was obtained from the clerk's office, this fact would make the two cases parallel at the time the copy of the complaint was obtained from the clerk, and the case at bar would still come within the ruling of the Thomas case that the fact defendant was not misled by the failure to endorse is immaterial.

It is respectfully urged that the trial court committed no error in its quashing of the service of summons in this case.

Respectfully submitted,
 STEPHENS, BRAYTON & LOWE,
 and THOMAS C. CUTHBERT.
Attorneys for Respondent

ADDENDUM

Counsel, as an officer of this Court and not acting for or on behalf of respondent, suggests that this Court under its ruling in the case of *Anderson v. Anderson*, 3 U 2d 277, 282 Pac. 2d 845, should, of its own motion, examine whether or not it has acquired jurisdiction of this case on appeal in view of this Court's holdings in the case of *Honerine Mining & Milling Co. v. Tallerday Steel Pipe & Tank Co.*, 30 Utah 449, 85 Pac. 626 and *State Tax Commission v. Larsen*, 110 Pac. 2d 558 that no appeal will lie from an order of the district court quashing summons where the action is not dismissed but is still pending. Since appellant has filed no petition for the granting of an appeal from an interlocutory order within the time prescribed under Rule 73(a) as

required by Rule 72(b), U.R.C.P., and this Court has repeatedly held that the failure to act within the time prescribed by Rule 73(a) prevents the Court from acquiring jurisdiction on the appeal, it would appear that this court is without jurisdiction to entertain the present appeal in this case.

In view of the uncertainties of the cases as to whether or not a party may raise a question of jurisdiction other than jurisdiction over his person, even on appeal, without waiving the question of personal jurisdiction, respondent specifically has not raised this question himself, but is only arguing the correctness of the trial court's ruling on the question of jurisdiction over his person as raised by his motion to quash service of summons.